

# The Application of the 2014 LCIA Rules to Arbitral Proceedings Seated in Italy

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On 25 July 2014, the London Court of International Arbitration (LCIA) announced the adoption of its new arbitration rules (2014 Rules). The 2014 Rules, which replace the 1998 LCIA rules (1998 Rules), apply to arbitration proceedings instituted on or after 1 October 2014, unless the parties agree otherwise.

The 2014 Rules preserve all the key features of LCIA arbitration, including with respect to the role of the LCIA in the appointment of the arbitral tribunal,<sup>1</sup> the expedited formation of the tribunal,<sup>2</sup> the conduct of multiparty proceedings<sup>3</sup> and the confidentiality of the arbitration.<sup>4</sup> At the same time, several significant changes have been made, including with respect to the form of, and the law governing, the arbitration agreement,<sup>5</sup> the conduct of the proceedings,<sup>6</sup> and the granting of interim relief prior to the constitution of the tribunal.<sup>7</sup>

This paper provides an overview of the 2014 Rules and considers their application to arbitration proceedings seated in Italy.

## The LCIA and institutional arbitration in Italy

The LCIA is the world's oldest arbitral institution. It was founded in 1891 as the City of London Chamber of Arbitration, formally inaugurated on 23 November 1892, and renamed as the London Court of International Arbitration in 1903. As The Law Quarterly Review reported at the inauguration of the Chamber:

*This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife.*<sup>8</sup>

Today, the LCIA is one of the world's leading international institutions for commercial dispute resolution services.<sup>9</sup> It is structured as a not-for-profit company limited by guarantee and operates under a three-tier structure, comprising (i) the company (ie, the LCIA itself) which has its own board, made up largely of prominent London-based arbitration practitioners, (ii) the Arbitration Court, the final authority for the proper application of the rules, whose members are appointed by the board, and (iii) the Secretariat, headed by the Registrar, which is responsible for the day-to-day administration of all disputes referred to the LCIA.

In order to submit their disputes to LCIA arbitration, parties must include specific language in their arbitration agreement.<sup>10</sup> The LCIA will then administer the proceedings in accordance with the LCIA rules, subject to any amendments thereof by the parties and the application of the mandatory rules of the law of the seat (also known as the *lex arbitri* or procedural law of the arbitration). The functions of the LCIA are set forth in article D of its Constitution and detailed in the rules. These include:

- the appointment of the arbitral tribunal,<sup>11</sup> including in proceedings involving three or more parties;<sup>12</sup>
- the expedited formation of the arbitral tribunal in cases of 'exceptional urgency';<sup>13</sup>

- the appointment of a temporary sole arbitrator to conduct emergency proceedings pending the formation or the expedited formation of the arbitral tribunal (emergency arbitrator);<sup>14</sup>
- the expedited appointment of a replacement arbitrator;<sup>15</sup>
- the revocation of any arbitrator's appointment;<sup>16</sup>
- the approval of a truncated tribunal's decision to continue the arbitration, including the making of any award;<sup>17</sup>
- up until the constitution of the arbitral tribunal, if the arbitration agreement is written in more than one language of equal standing and the parties have not agreed otherwise, the determination of the language of the proceedings;<sup>18</sup> and
- the determination of the arbitration costs<sup>19</sup> and of any payments to be made by the parties on account thereof.<sup>20</sup>

Italian arbitration law does not require that arbitration proceedings seated in Italy be administered by an institution headquartered in Italy. Accordingly, parties have the option of having their Italy-seated arbitration administered by the LCIA. The legal framework for institutional arbitration in Italy is set forth in article 832 of the Italian Code of Civil Procedure (CPC). Under that provision:

1. *The agreement to arbitrate may refer to a set of pre-existing arbitration rules.*
  2. *If there is a conflict between the agreement to arbitrate and the arbitration rules to which such agreement refers, the agreement to arbitrate shall prevail.*
  3. *If the parties have not agreed otherwise, the arbitration rules in force at the time of the commencement of the arbitration shall apply to the proceedings.*
- [...]
5. *The arbitration rules may contemplate further grounds to challenge and replace arbitrators in addition to those already set forth in the statute.*
  6. *If the arbitral institution refuses to administer the arbitration, the agreement to arbitrate remains effective, but [articles 806-831 CPC] apply [ie, the arbitration converts into ad hoc proceedings].*

Institutional arbitration has become a popular means to resolve international commercial disputes in Italy, with around 1,500 institutional arbitrations commenced in 2011–2012.<sup>21</sup> However, LCIA arbitration remains largely unknown in Italy, mostly for cultural and linguistic reasons. As the LCIA statistics indicate, in the last five years no or virtually no Italian companies or individuals have participated in LCIA proceedings.<sup>22</sup> This trend is unfortunate. Depending on the circumstances, LCIA proceedings may be a more appealing alternative to proceedings conducted under the aegis of other institutional rules. For instance, under the LCIA rules, arbitration costs are determined on an hourly-rate basis. If the amount in dispute is large, LCIA proceedings

are likely to be less expensive than other forms of institutional arbitrations, where the arbitration costs are determined on an *ad valorem* basis. Likewise, if confidentiality is likely to be a matter of concern for the parties, the LCIA rules impose confidentiality obligations that have little or no equivalent in many other international arbitration rules.

### The arbitration agreement

The preamble of the 2014 Rules adopts a notion of ‘arbitration agreement’ that includes ‘any agreement, submission or reference howsoever made or evidenced in writing (whether signed or not)’. It is therefore possible under the 2014 Rules to institute LCIA proceedings based on an oral arbitration agreement, provided that it is evidenced in writing.

Pursuant to article 16.4 of the 2014 Rules, the arbitration agreement is governed by the law of the seat. Thus, unless the parties agree otherwise, LCIA agreements providing for arbitration seated in Italy are governed by Italian law.

### Formal validity

Italian law contemplates two separate regimes applicable to formal validity of arbitration agreements, depending upon whether the agreement to arbitrate is included in a submission agreement<sup>23</sup> or in an arbitration clause.<sup>24</sup>

Pursuant to article 807 CPC, submission agreements ‘must be made in writing, and must determine the subject matter of the dispute referred to arbitration’. Article 807 CPC further provides that the ‘in writing’ requirement is complied with if the submission agreement is ‘included in a telegram, telex, telecopier, or telematics message’. In contrast, article 808, first paragraph, CPC provides that arbitration clauses need only be ‘recorded’ in writing (ie, ‘in a document meeting the formal requirements set forth in article 807’).

Thus, under Italian law, the ‘in writing’ requirement applicable to submission agreements is arguably an *ad substantiam* requirement (ie, the submission agreement is null and void if it is not made in writing and is not executed by both parties), whereas arbitration clauses need only be ‘recorded’ (ie, evidenced, in writing).

The notion of arbitration agreement adopted in the preamble of the 2014 Rules is consistent with the Italian rules governing formal validity of arbitration clauses. However, submission agreements providing for LCIA arbitration seated in Italy will be subject to the more relaxed formal requirement set forth in the preamble of the 2014 Rules only if article 807 is deemed to be a non-mandatory rule of Italian law, or if the rules on formal validity of the New York Convention apply. As to the latter point, the ‘in writing’ requirement set forth in Article II of the New York Convention applies to both pre-dispute arbitration agreements and to submission agreements entered into after the dispute has arisen. Such requirement is satisfied if the arbitration agreement is either ‘signed by the parties’ or ‘contained in an exchange of letters or telegrams’, whether signed or not. Since the 1980s, Italian courts have treated article II of the New York Convention as a uniform rule governing the formal validity of international arbitration agreements, irrespective of the applicable national law. On this basis, they have routinely upheld the formal validity of international arbitration agreements executed by only one of the parties, or not executed at all, in cases where it was clear that the parties had agreed to arbitrate their disputes.<sup>25</sup>

LCIA arbitration users selecting Italy as the seat of their proceedings should be mindful of certain provisions of the Italian

Civil Code (CC) contemplating a special regime for arbitration agreements included in general terms and conditions of a contract, whereby the party executing those terms and conditions must specifically countersign in writing the arbitration agreement included therein.<sup>26</sup> These rules are normally considered mandatory under Italian law. Accordingly, their application would not be excluded by merely relying upon the preamble of the 2014 Rules. But if article II of the New York Convention is deemed to apply, it will prevail over any inconsistent Italian law provision.

### Substantive validity

As noted, pursuant to article 16.4 of the 2014 Rules, the arbitration agreement is governed by the *lex arbitri*. This conflict-of-laws rule aims to reconcile uncertainty regarding the law governing the arbitration agreement in the absence of a choice-of-law clause applicable specifically to the arbitration agreement.

Failing the parties’ specific choice, Italian courts have in a number of instances declined to determine the law governing the arbitration agreement by reference to the choice-of-law clause applicable to the main agreement, focusing instead on the *lex arbitri*.<sup>27</sup> The approach followed by the 2014 Rules and Italian law is consistent with article V(1)(a) of the New York Convention, pursuant to which – in the absence of agreement – the validity of the arbitration agreement is determined based on the ‘law of the country where the award was made’, which is typically the law of the country where the arbitration has its seat.<sup>28</sup>

Courts in other jurisdictions, however, have adopted different approaches. Depending on the circumstances, they have given weight to the law governing the main agreement,<sup>29</sup> international law,<sup>30</sup> and the ‘validation principle’.<sup>31</sup> The establishment of a uniform conflict of laws rule applicable to the arbitration agreement could reduce uncertainty in this area and it is a notable feature of the 2014 Rules.

### The conduct of the arbitration proceedings

Consistent with the generally accepted territoriality principle, article 16.4 of the 2014 Rules provides that – in addition to governing the arbitration agreement – the *lex arbitri* also governs the conduct of the arbitration proceeding, determining among other things which state courts are competent to undertake supervisory, conservatory or other interim measures at the seat in relation to the arbitration proceedings, and the grounds upon which any award may be challenged.

Unless the parties agree otherwise, the default seat of any LCIA arbitration ‘shall be London’, but while the 1998 Rules provide that the LCIA Court will take a final decision concerning the seat, notably the 2014 Rules foresee that the arbitral tribunal will take such decision.<sup>32</sup> If the parties reach agreement as to the seat of the arbitration after constitution of the arbitral tribunal, such agreement will be subject to the tribunal’s consent.<sup>33</sup> In view of the importance of the seat, under the same territoriality principle, as dictating the nationality of any award and thus the court of appropriate jurisdiction for any petition to set aside the award, article 16.1 of the 2014 Rules is indeed noteworthy. Whereas certain other leading institutional rules of international arbitration such as the 2012 International Chamber of Commerce Rules (the ICC Rules, article 18.1) or the 2010 Chamber of Arbitration of Milan Rules (the CAM Rules, article 4.3) provide that absent party agreement the institution will fix the seat, the LCIA has shifted the final say in this regard to the tribunal. This shift in the case of the LCIA is notable in two respects. On the one hand, it reinforces the principle of party autonomy by affording the

parties the opportunity to agree on the seat even after the arbitral tribunal has been constituted, also as a function of the perceived ‘fit’ between tribunal members and the nationality of the seat. On the other hand, the new rule enables the arbitral tribunal to fix a different seat than the parties have agreed, to the extent such agreement takes place after constitution of the tribunal, which seems to undercut the same principle of party autonomy. Notably, and consistent with article 16.3 of the 2014 Rules, article 816 CPC provides that, unless the parties agree otherwise, the arbitral tribunal may hold any hearings, gather evidence and hold its deliberations at any convenient place.

The 2014 Rules introduce several amendments to the rules governing the conduct of the proceedings. We consider these rules below in light of Italian arbitration law.

#### Request for arbitration

Under the 2014 Rules, the claimant is not required to pay the LCIA filing fee prior to institution of the arbitration, but rather merely to state in its request that such fee ‘is being paid’.<sup>34</sup> This provision may be seen as enabling commencement of an LCIA arbitration effectively for all purposes, including timely interruption of any statute of limitations or prescription period, even in those cases where for logistical or other reasons simultaneous payment of the filing fee is not possible. The 2014 Rules also contemplate that the claimant may file its request and accompanying exhibits with the LCIA Registrar in ‘electronic form (as e-mail attachments)’,<sup>35</sup> including by using a ‘standard electronic form’ that will be made ‘available online from the LCIA’s website’.<sup>36</sup> This too promises to facilitate even further the effective commencement of an LCIA arbitration, particularly in international cases.

The LCIA rules relating to the commencement of arbitration proceedings are not entirely consistent with Italian law on tolling of the statute of limitations period. On the one hand, Italian law explicitly characterises these as mandatory rules (article 2936 CC) and, on the other, it subjects tolling to the formal notification of a request for arbitration through the bailiffs service (article 2943, fourth paragraph, CC). To the extent the statute of limitations raises substantive law issues, the Italian mandatory rules on tolling of statute of limitations would apply to an arbitration seated in Italy only if Italian law were also the applicable substantive law.<sup>37</sup>

#### Response to the request for arbitration

Pursuant to article 2.1(ii) of the 2014 Rules, in its response the respondent must ‘confirm or deny’ all or part of the claims set forth in the request, ‘including the claimant’s invocation of the arbitration agreement in support of its claim’. In terms of possible waiver of jurisdictional objections, prudence would dictate that a respondent who contemplates possibly making a jurisdictional objection should at least expressly reserve, in the response, its right to make such an objection more fully in the subsequent proceedings, and normally at the latest in its fuller statement of defence, consistent with the express provision to this effect in article 23.3 of the 2014 Rules.

Pursuant to article 817 CPC, the party failing to raise a jurisdictional objection in the first defence ‘following acceptance of the arbitrators to act’ may not on this basis challenge the arbitral award. In the LCIA context, however, it is unclear whether the event triggering the sanction in article 817 is the mere acceptance by the arbitrators, or the actual appointment of the tribunal by the LCIA, which typically follows such acceptance.

#### Time limits

Consistent with the general trend toward more express provisions respecting time and cost efficiency, the 30-day time limits set forth in the 1998 Rules have been reduced to 28 days. This new time limit applies, in particular, to the filing of the respondent’s response. While this difference may be considered modest, it can be seen as serving as an additional basis for contending that the 2014 Rules are meant overall to provide for greater speed.

#### Constitution of the tribunal

Pursuant to article 5.1 of the 2014 Rules, no dispute concerning the ‘sufficiency of the request or the response’ impedes the constitution of the tribunal. In this respect, the 2014 Rules, like the previous 1998 Rules, do not provide for any kind of ‘prima facie’ assessment by the institution as to whether it is satisfied that an arbitration agreement under the Rules may exist; this stands in contrast to the 1998 ICC Rules and, arguably in reinforced form, the 2012 ICC Rules (article 6.4), and the 2010 CAM Rules (article 11).

Consistent with the practice under certain other administered arbitration rules, the 2014 Rules provide only general guidance as to the impartiality and independence of the arbitrators. In particular, all prospective LCIA arbitrators must file a statement of acceptance and independence, including to the effect that the prospective arbitrator is ‘ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious conduct of the arbitration’.<sup>38</sup>

On the other hand, article 815 CPC lays down specific grounds upon which to challenge the impartiality and independence of an arbitrator, including cases in which the arbitrator:

- has an interest in the dispute, either directly or through an entity, association or corporation of which he is a director (article 815 CPC);
- has a close family or de facto relationship with one of the parties, their counsel or legal representatives (article 815 CPC);
- is a party to a pending lawsuit against one of the parties, their counsel or legal representatives (article 815 CPC);
- has a professional relationship with one of the parties that is of such a nature as to call into question his impartiality and independence (article 815 CPC); or
- has given legal advice or provided an expert opinion or testimony on the dispute to a party (article 815 CPC).

Parties must raise any challenge under article 815 CPC within ‘10 days from the date when the arbitrator being challenged was nominated or when the party making the challenge was informed of the facts and circumstances on which the challenge is based’ (article 815 CPC). While the imposition of a time limit within which to challenge an arbitrator is consistent with the need to achieve certainty in the composition of the tribunal, it is difficult to reconcile with the supposedly mandatory nature of article 815 CPC. Moreover, any challenge of an award based on an arbitrator’s lack of impartiality or independence is statutorily premised on the party having timely raised the matter in the arbitration (article 829 CPC), which also indicates that article 815 is not mandatory.

Notably, among the grounds for challenge set forth in article 815 there are some that the 2004 IBA Guidelines on Conflict of Interest in International Arbitration explicitly characterise as ‘waivable’.<sup>39</sup> It would therefore appear that any assessment of the arbitrators’ impartiality and independence should be carried out with reference to the circumstances of the case, and not by abstract reference to the list provided by article 815 CPC.

### Calendar of the proceedings

Again, consistent with the general trend to include express provisions respecting increased speed and efficiency in arbitration, article 15.10 of the 2014 Rules provides that the tribunal ‘shall seek to make its final award as soon as reasonably possible following the last submission from the parties (whether made orally or in writing)’. To that effect, the tribunal is required to ‘set aside adequate time for deliberations as soon as possible after that last submission’, and ‘notify the parties of the time it has set aside’. In this regard, it is notable that unlike certain other institutional rules such as the ICC Rules (article 27) or the CAM Rules (article 28), the LCIA Rules do not expressly foresee a formal declaration by the arbitral tribunal of the ‘closing’ of the proceedings with respect to the matters to be decided in the award. Depending on the case, it may therefore make sense to clarify in an LCIA arbitration that after the ‘last submission’ for purposes of article 15.10 no further submissions may be made, or evidence produced, with respect to the matters to be decided in the award unless requested or authorised by the arbitral tribunal itself.

### Legal representation

Article 18.3 of the 2014 Rules provides that any changes in, or additions to, the parties’ legal representatives should be notified to all other parties, the tribunal and the LCIA Registrar. Any such changes are conditional upon the tribunal’s approval, which may be withheld if the change ‘compromise[s] the composition of the arbitral tribunal or the finality of the award (on the grounds of possible conflict or other like impediment)’.<sup>40</sup> This notable provision, which does not have a counterpart in most other leading institutional rules, may be seen as enabling the tribunal to address potential conflicts issues as early as possible in the proceedings, and not only when new counsel makes a formal first appearance in the proceedings. It may also be seen as encouraging parties who contemplate changes or additions to their counsel to consider them earlier and more specifically with respect to their possible effect on the composition of the tribunal and the relevance of that composition to enforceability of the award.

### Parties’ conduct and apportionment of costs

The 2014 Rules contain an annex prescribing ‘general guidelines’ for the conduct of the parties’ legal representatives in the arbitration, which are intended to ‘promote the good and equal conduct of the parties’ legal representatives appearing by name within the arbitration’. Pursuant to article 18.5 of the 2014 Rules, each party is required to ensure that its legal representatives have agreed to comply with these guidelines, which broadly provide that such representatives must not:

- engage in activities intended unfairly to obstruct the arbitration or to jeopardise the finality of the award;
- knowingly make any false statements to the tribunal or the LCIA Court;
- knowingly procure or assist in the preparation of or rely upon any false evidence presented to the tribunal or the LCIA Court;
- knowingly conceal or assist in the concealment of any document that is ordered to be produced by the tribunal; and
- initiate unilateral contact with a member of the tribunal or the LCIA Court without written disclosure to all the parties, the tribunal and (where appropriate) the LCIA Registrar.

A breach of these standards would typically be considered by the tribunal when apportioning costs between the parties in the final

award pursuant to article 28.4 of the 2014 Rules. It could also give rise to adverse inferences against the non-compliant party (for instance, in the context of a failure or refusal to produce documents or to make available any evidence, including witness testimony, ordered to be produced).

Notably, article 18.6 of the 2014 Rules expressly provides that in the event of a violation of the general guidelines the tribunal may order one or more sanctions against the legal representative, including a ‘written reprimand’, a ‘written caution’ and any other measure necessary to fulfil the tribunal’s own general duties to act fairly and impartially, to give each party a reasonable opportunity to be heard, and to adopt procedures ‘suitable to the circumstances of the arbitration’.<sup>41</sup> In this regard, the 2014 Rules may be seen as taking even further, through an express recitation of rights and duties of the parties’ legal representatives and the tribunal members, the trend toward codification of a duty of good faith in arbitration raised in (eg, the 2010 International Bar Association Rules on the Taking of Evidence in International Arbitration (Preamble No. 3, article 9.7)).

### The emergency arbitrator

The 2014 Rules include provisions for the appointment of an emergency arbitrator to ‘conduct emergency proceedings pending the formation or the expedited formation of the arbitral tribunal’ for the adoption of ‘emergency relief’, ‘unless otherwise agreed by the parties’.<sup>42</sup> The increasing inclusion of emergency arbitrator provisions in institutional arbitration rules reflects the potential importance of interim emergency relief requests in arbitration generally and an increasing dissatisfaction of some arbitration users with the ability to obtain such relief through the state courts, whether at the seat or elsewhere.<sup>43</sup> It may also be seen as a growing acknowledgment on the part of arbitral institutions that there can be a significant ‘vacuum of authority’ between the time of commencement of the arbitration and the subsequent constitution of the tribunal, and that some form of emergency procedure is therefore required to fill that gap.

The main features of the LCIA emergency arbitrator provisions set forth in the 2014 Rules are similar to those of other arbitral institutions, and can be summarised as follows:

- the party seeking emergency relief must file an application for the appointment of an emergency arbitrator with the LCIA Registrar. A copy of the application must be provided to all other parties to the arbitration;<sup>44</sup>
- the LCIA Court shall determine the application ‘as soon as possible in the circumstances’ and, if the application is granted, appoint an emergency arbitrator ‘within three days of the registrar’s receipt of the application (or as soon as possible thereafter)’;<sup>45</sup>
- consistent with the nature of the emergency proceedings, the emergency arbitrator may conduct the proceedings in any manner that is deemed appropriate, affording each party an opportunity to be consulted on the claim for emergency relief, but without being required to hold a hearing;<sup>46</sup>
- the emergency arbitrator ‘shall decide’ the claim for emergency relief ‘as soon as possible, but no later than 14 days following’ the emergency arbitrator’s appointment;<sup>47</sup> and
- the claim for emergency relief may be decided by ‘order or award’. In the event the claim is decided in an award, it ‘shall’ ‘take effect as an award under article 26.8’, and thus ‘shall be final and binding’ (subject to variation, discharge, or revocation by the tribunal) and the parties undertake to carry it out ‘immediately and without delay’.<sup>48</sup>

Importantly, pursuant to article 9.14 of the 2014 Rules parties may 'opt in' or 'opt out' of the new emergency arbitrator provisions, and thus careful attention to this option is called for. Thus the provisions shall not apply if the parties have concluded their LCIA arbitration agreement before 1 October 2014 and have not agreed in writing to opt in to the provisions. The provisions shall also not apply if the parties have agreed in writing at any time to opt out of them. Accordingly, recitals in arbitration agreements stating, for example, that the parties 'agree to the LCIA Rules as in effect on the date of signing of this contract' or 'agree to the LCIA Rules as in effect on the date of commencement of arbitration' are to be treated with circumspection by parties who wish or do not wish, as the case may be, to avail themselves of the new emergency arbitrator provisions. Furthermore, the provision that emergency relief could be granted in the form of an award is a considerable improvement relative to similar emergency proceedings under other rules and should make it comparatively easier to enforce interim measures. At the same time, the enforcement of an award for emergency relief is unlikely to fall within the scope of the New York Convention, and would thus depend on the law of the place where enforcement is sought.

The parties' agreement in respect of an emergency arbitrator's power to grant interim relief is subject to the mandatory rules of the *lex arbitri*. Italian law generally prohibits the granting of arbitral interim measures, including those issued by an emergency arbitrator. Specifically, pursuant to article 818 CPC, 'arbitrators may not grant attachments or other interim measures, unless otherwise provided by law.' At present, the only exception to the article 818 prohibition is included in article 35 of Legislative Decree No. 5 of 17 January 2003, which empowers arbitrators to suspend the effectiveness of a shareholders' resolution pending final adjudication of a dispute relating to its validity. Italian arbitration scholars characterise article 818 as an unquestionably mandatory provision of Italian arbitration law, a position that was endorsed by the Italian Supreme Court in 2009,<sup>49</sup> and an ICC tribunal in 2012.<sup>50</sup> Parties to an LCIA arbitration seated in Italy would therefore have to resort to the state court of Italy or other competent jurisdiction to obtain interim relief. Italian courts have proven to be more efficient and expeditious than one might expect in granting a wide range of highly effective relief, including on an *ex parte* basis.

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## Notes

- 1 Compare Article 5.7 of the 2014 Rules with Article 5.5 of the 1998 Rules.
- 2 Compare Articles 9A and 9C of the 2014 Rules with Article 9 of the 1998 Rules.
- 3 Compare Article 8 of the 2014 Rules with Article 8 of the 1998 Rules.
- 4 Compare Article 30 of the 2014 Rules with Article 30 of the 1998 Rules.
- 5 See, eg, Article 16.4 of the 2014 Rules.
- 6 See, eg, the Annex prescribing 'general guidelines' for the conduct of the parties' legal representatives in the arbitration and Article 18.5 of the 2014 Rules.
- 7 Article 9B of the 2014 Rules.
- 8 [www.lcia.org/LCIA/Our\\_History.aspx](http://www.lcia.org/LCIA/Our_History.aspx).
- 9 In 2013, 290 arbitrations were referred to the LCIA, representing an increase of almost 10% as compared to 2012, when 265 arbitrations were filed with the LCIA. While based in London, over 80% of parties in pending LCIA cases are not of English nationality. The International Court of Arbitration of the International Chamber of Commerce in Paris remains the world's leading arbitration institutions in terms of caseload, with 767 requests for arbitration filed in 2013 and 759 in 2012. [www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics](http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics).
- 10 The LCIA recommends the adoption of the following model arbitration clause: 'Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be [one/three]. The seat, or legal place, of arbitration shall be [City and/or Country]. The language to be used in the arbitral proceedings shall be [ ]. The governing law of the contract shall be the substantive law of [ ].'
- 11 Article 5 of the 2014 Rules.
- 12 Article 8 of the 2014 Rules.
- 13 Article 9A of the 2014 Rules.
- 14 Article 9B of the 2014 Rules.
- 15 Article 9C of the 2014 Rules.
- 16 Article 10 of the 2014 Rules.
- 17 Article 12 of the 2014 Rules.
- 18 Article 17 of the 2014 Rules.
- 19 Article 28 of the 2014 Rules.
- 20 Article 24 of the 2014 Rules.
- 21 Istituto Scientifico per l'Arbitrato, la Mediazione e il Diritto Commerciale, Sesto Rapporto sulla diffusione della giustizia alternativa in Italia, 2013, p. 34.
- 22 See the LCIA Registrar's Reports for 2013 and 2012, and the LCIA Director General's Report for 2011-2009, available at [www.lcia.org/LCIA/Casework\\_Report.aspx](http://www.lcia.org/LCIA/Casework_Report.aspx).
- 23 The submission agreement (*compromesso*) is a purpose-drafted agreement to submit to arbitration a dispute that has already arisen between the parties.
- 24 The arbitration clause (*clausola compromissoria*) records the parties' agreement to submit to arbitration future disputes that may arise out of the contract containing the clause.
- 25 See, eg, Italian Supreme Court (Grand Chamber), judgment No. 3285 of June 3, 1985; Court of Appeal of Trieste, judgment of June 27, 1988.
- 26 Pursuant to Article 1341 c.c., '[t]he general contractual conditions drafted by one of the parties are effective towards the other if, at the time the contract was executed, that other party knew or should have known of them. In any event, the general contractual conditions contemplating, in favour of the party who drafted them, an arbitration agreement or a waiver to seize the [Italian] state court are ineffective if they have not been specifically approved in writing.' Pursuant to Article 1342 c.c., '[i]n contracts entered into by executing pre-drafted, standardized general terms and conditions, which are intended to govern in a uniform fashion certain contractual relationships, the clauses added to the standard form prevail over the incompatible standard clauses included therein [...]. The rule set forth in the second paragraph of Article 1341 c.c. applies.'
- 27 See, eg, Court of Appeal of Florence, judgment of January 30, 2006; Court of Appeal of Genoa, judgment of February 3, 1990; Italian Supreme Court (Grand Chamber), judgment No. 563 of January 28, 1982; Italian Supreme Court (Grand Chamber), judgment No. 2448 of April 15, 1980.
- 28 Pursuant to Article 823, second paragraph, No. 2, c.p.c., which provides that the award must include the seat of the arbitration proceedings, which indirectly confirms that awards are normally

- made in the country where the arbitration proceedings are conducted (otherwise Article 823 c.p.c. would not apply to arbitration proceedings resulting in awards made outside Italy, since that provision applies only insofar as the seat of the arbitration is in Italy).
- 29 English courts infer the law governing the arbitration clause based on the parties' choice of law clause applicable to the main contract. See, eg, *Sulamérica Cia Nacional de Seguros S.A. and others v. Enesa Engenharia S.A. and others* [2012] EWCA Civ 638, paragraphs 11 and 26. See also *Sonatrach Petroleum Corporation (BVI) v. Ferrell International Limited* [2001] WL 1476318, paragraph 32, noting that '[w]here the substantive contract contains an express choice of law, but the agreement to arbitrate contains no separate express choice of law, the latter agreement will normally be governed by the body of law expressly chosen to govern the substantive contract.' See also *Leibinger v. Stryker Trauma GmbH* [2005] EWHC 690 (Comm) and *Sumitomo Heavy Industries Ltd v. Oil & Natural Gas Commission* [1994] 1 Lloyd's Rep 45. The same conflict of laws rule has been applied in other common law jurisdictions, including: (i) Australia (see, eg, *Recyclers of Australia Pty Ltd v. Hettlinger Equip. Inc.* (2000) 175 A.L.R. 725 (Australian Fed. Ct.), applying Iowa law, in accordance with the choice-of-law clause included in the main contract, to questions of substantive validity of arbitration clause); (ii) Hong Kong (see, eg, *Beyond the Network Ltd v. Vectone Ltd* [2005] HKEC 2075); and (iii) India (see, eg, *Nat'l Thermal Power Corp. v. The Singer Co., in YBCA, 1993, Vol. XVIII, pp. 403, 406-407* (S.Ct. of India 1992), holding that 'where the proper law of the contract is expressly chosen by the parties, as in the present case, such law must, in the absence of an unmistakable intention to the contrary, govern the arbitration agreement which, though collateral or ancillary to the main contract, is nevertheless a part of such contract.')
- 30 French courts have held that international arbitration agreements are autonomous and independent from the main contract and national legal systems, and are thus subject to international law and the usages of international trade, to 'maximize the enforceability and the efficacy of international commercial arbitration agreements.' G.B. Born, *International arbitration agreements: legal framework*, in G.B. Born, *International Arbitration: Law and Practice*, 2012, p. 56. See, eg, *Comité populaire de la municipalité de Khoms El Mergeb v. Dalico Contractors, JDI (Clunet)* 121 [1994], 432 in which the French Cour de cassation held that 'by virtue of a substantive rule of international arbitration [...] the existence and effectiveness of the arbitration agreement are to be assessed, subject to the mandatory rules of French law and international public policy, on the basis of the parties' common intention, there being no need to refer to any national law.'
- 31 See, eg, Article 178(2) Swiss Private International Law Act, which provides that 'an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.'
- 32 Article 16.1 of the 2014 Rules.
- 33 Article 16.1 of the 2014 Rules.
- 34 Article 1.1 (vi) of the 2014 Rules; Article 1.1 (f) of the 1998 Rules.
- 35 Article 1.2 of the 2014 Rules.
- 36 Article 1.3 of the 2014 Rules.
- 37 This approach is consistent with the Rome I Regulation on conflict of laws, which in defining the scope of the law applicable to a contract provides that such law 'shall govern in particular [...] the various ways of extinguishing obligations, and prescription and limitation of actions' (Article 12.1 (d)).
- 38 Article 5.4 of the 2014 Rules.
- 39 See, eg, paragraph 2.3.8 of the IBA Guidelines, which treats the arbitrator's 'close family relationship' with 'one of the parties or with a manager, director or member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or with a counsel representing a party' (Article 815, first paragraph, No. 3, c.p.c.) as a waivable conflict of interest, that is, a conflict that the parties may agree does not constitute grounds for challenging an arbitrator.
- 40 Article 18.4 of the 2014 Rules.
- 41 Article 14.4(i) and (ii) of the 2014 Rules.
- 42 Article 9.4 of the 2014 Rules. These rules are intended to bring the LCIA rules closer to the arbitration rules of competing institutions, including (i) the Stockholm Chamber of Commerce ('SCC') (Appendix II of the 2010 SCC Rules), (ii) the Singapore International Arbitration Centre ('SIAC') (Schedule 1 of each of the 2010 and 2013 SIAC Rules), and (iii) the ICC (Appendix V of the 2012 ICC Rules).
- 43 Pursuant to Article 9.12 of the 2014 Rules, the emergency arbitrator's provisions do not affect a party's right to seek interim measures from any court of competent jurisdiction in appropriate circumstances prior to the constitution of the tribunal.
- 44 Article 9.5 of the 2014 Rules.
- 45 Article 9.6 of the 2014 Rules. Pursuant to the ICC Rules, an emergency arbitrator will be appointed 'normally within two days.'
- 46 Article 9.7 of the 2014 Rules.
- 47 Article 9.8 of the 2014 Rules.
- 48 Articles 9.9 and 26.8 of the 2014 Rules.
- 49 Italian Supreme Court, judgment No. 9909 of April 27, 2009.
- 50 The ICC tribunal held that 'Claimants have based their request for interim measures on Article 23(I) ICC Rules [...]. However, since, pursuant to Article 16 SPA, the arbitration takes place in [Italy], it is governed by the provisions of the *lex loci arbitri* contained in Articles 806 et seq. [c.p.c.]. Since Article 818 [c.p.c.] constitutes mandatory law from which the Parties cannot derogate by agreeing on the ICC Rules, the Tribunal is of the view that Claimant's request is primarily governed by Article 818 [c.p.c.] and only subsidiarily by Article 23(I) ICC Rules. [T]he Tribunal concludes that it is not entitled to grant interim measures under Article 818 [c.p.c.] and thus dismisses Claimant's Request for Interim Measures.'



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Cleary Gottlieb Steen & Hamilton LLP is a leading law firm with approximately 1,200 lawyers and 16 offices located in major financial centers around the world. The firm is recognised as among the top litigation and arbitration groups in the world, both domestically and internationally. Cleary Gottlieb's Italian litigation and arbitration lawyers represent Italian and international clients, including sovereign states, in high-profile cases. They handle a broad range of contractual, financial, corporate governance and regulatory disputes (including antitrust, energy and transportation), before civil and administrative courts, as well as arbitral tribunals. Cleary Gottlieb's dispute resolution practice and lawyers are ranked among the best in Italy by leading legal publications.